Supreme Court, U.S.
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No. 98-2058

In The

Supreme Court of the United States

R.M.S. TITANIC, INCORPORATED,
successor in interest to Titanic
Ventures, limited partnership,

Petitioner,

v.

CHRISTOPHER S. HAVER;
DEEP OCEAN EXPEDITIONS, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

DAVID G. CONCANNON, ESQUIRE
KOHN, SWIFT & GRAF, P.C.
1101 Market Street, 24th Floor
Philadelphia, PA 19107-2924
(215) 238-1700

*Counsel of Record for Respondents
Alfred S. McLaren, Ph.D.,
Don Walsh, Ph.D. and
Ralph White*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER THE FOURTH CIRCUIT PROPERLY FOUND THAT THE DISTRICT COURT LACKED AUTHORITY TO ENTER AN *IN PERSONAM* ORDER AGAINST NON-PARTIES OVER WHICH IT LACKED PERSONAL JURISDICTION.

2. WHETHER THE FOURTH CIRCUIT PROPERLY FOUND THAT TRADITIONAL SALVAGE RIGHTS DO NOT INCLUDE THE EXCLUSIVE RIGHT TO "EXPLOIT THE WRECK" BY INDEFINITELY PROHIBITING OTHERS FROM VISITING AND PHOTOGRAPHING THE *TITANIC*.

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding.

Respondents Alfred S. McLaren, Ph.D., Don Walsh, Ph.D. and Ralph White were not "defendants" or "parties" in the proceedings before the district court. To the contrary, they were non-parties. Petitioner R.M.S. Titanic, Inc., the plaintiff/appellee below, never actually filed a complaint against respondents, nor did it serve them with any process. Petitioner's process consisted solely of filing a motion for preliminary injunction naming respondents and others as "defendants" in its *in rem* action against the wreck of the *R.M.S. Titanic*, to which respondents had never been made a party, and giving respondents informal notice of the motion's pendency by mailing them copies. Similarly, respondents were not "parties" in the appellate court. They did not participate in the appellate court proceedings, although the appellate court proceedings directly affected their individual rights. McLaren, Walsh and White are participating here as respondents because they have been named as such, and they have a personal interest in the outcome of the petition.

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STATEMENT OF THE CASE

The petition challenges the decision of the United States Court of Appeals for the Fourth Circuit that a United States District Court in Virginia may not issue an injunction in an *in rem* salvage proceeding against the wreck of the *R.M.S. Titanic*, which rests in international waters, prohibiting non-parties over which the court lacks *in personam* jurisdiction from visiting or photographing the wreck. The petition also challenges the Fourth Circuit's decision that traditional salvage rights do not include the exclusive right "to exploit the wreck" by controlling access and photography.

The Fourth Circuit's decision resolved a seven year legal battle over access to the *Titanic*. App. 7-12. Unlike the district court, in balancing the equities the appellate court properly considered *all* of the continuous multiple uses of the *Titanic*, including exploration, photography and scientific study, and the interests of those who would be adversely affected by the district court's ruling, including the respondents here. The appellate court's decision will pave the way for additional exploration of historic shipwrecks lost in the deep ocean because it eliminates the threat to explorers of being subjected to criminal sanctions in a foreign jurisdiction simply for looking at a sunken shipwreck in a public place. A reversal of this decision, however, will actually discourage exploration and salvage because it will provide an economic incentive for a salvor to "exploit the wreck" by prohibiting all access and photography, and to leave property on the bottom of the sea, in an effort to enhance the value of the salvor's new-found photographic rights.

As detailed below, there is no cause for this Court to review the Fourth Circuit's proper determination that the district court's authority to exercise *in rem* jurisdiction over property does not carry with it a concomitant, derivative power to enter ancillary *in personam* orders over individuals who are not parties to the proceedings and are not located within the court's territorial jurisdiction. App. 36-40. Similarly, there is no cause for this Court to review the Fourth Circuit's determination that the district court improperly expanded traditional salvage rights to include the exclusive right to photograph property that has yet to be saved. App. 40-44. As the appellate court found, this unprecedented expansion of traditional salvage rights is contrary to purpose of salvage law, which is to encourage the voluntary rescue of property lost at sea, because it provides an economic disincentive for the salvor to actually save the property at risk. App. 41-42.

A. The Petitioner And Respondents

Petitioner, R.M.S. Titanic, Inc. ("RMST"), is a Florida corporation with headquarters in New York, New York. RMST is the salvor in possession of the *R.M.S. Titanic*. App. 49. RMST and its predecessor in interest, Titanic Ventures, Limited Partnership ("TVLP"), have participated in five of the ten expeditions that have visited the *Titanic* since its discovery in 1985. The petitioner is the only entity to engage in salvage operations at the wreck site (in 1987, 1993, 1994, 1996 and 1998). The petitioner did not participate in the discovery of the *Titanic* or in any of the five scientific and photographic expeditions that have visited the wreck site (in 1985, 1986, 1991, 1995 and 1998).

Respondent Alfred S. McLaren, Ph.D., Capt., U.S.N. (Ret.), is a resident of New York, New York. Dr. McLaren is a graduate of the U.S. Naval Academy with a distinguished military career as a submarine officer. As a naval officer, Dr. McLaren made three Arctic expeditions, including the first submerged transit of the Northwest Passage and a North Pole expedition that included the first survey under ice of the entire Siberian Continental Shelf. Dr. McLaren has been awarded the Distinguished Service Medal, the nation's highest peacetime award, and two Legions of Merit. Dr. McLaren holds a doctorate degree in the physical geography of the polar regions from the University of Colorado. He is currently the President of The Explorers Club, an international multidisciplinary, professional society dedicated to the advancement of field research, resource conservation, and scientific exploration of land, sea, air and space.

Respondent Don Walsh, Ph.D., Capt. U.S.N. (Ret.), is a resident of Myrtle Point, Oregon. Dr. Walsh has been continuously involved in the design and operation of deep ocean submersibles for more than 40 years. He graduated from the U.S. Naval Academy in 1954 and served 14 years at sea, mostly in submarines. In 1959, Dr. Walsh was designated U.S. Navy deep submersible pilot No. 1. In 1960, Dr. Walsh and Jacques Piccard piloted the U.S. Navy's bathyscaph *Trieste*, a deep diving submersible, to a depth of 35,800 feet in the Marianas Trench, the deepest place in the world's oceans. This accomplishment, for which Dr. Walsh was awarded his first Legion of Merit, has never been repeated. Dr. Walsh holds a doctorate degree in physical oceanography from Texas

A&M University. He is currently President of International Maritime Incorporated, an Oregon-based marine consulting company.

Respondent Ralph White is a resident of Los Angeles, California. White is a distinguished cinematographer and underwater photographer, and the founder of White-Pix-Productions. He has participated as a cinematographer and submersible cameraman on four expeditions to the *Titanic*, including the expedition that discovered the *Titanic* in 1985, the first salvage expedition in 1987, and photographic expeditions in 1991 and 1995. He has made 23 submersible dives to the wreck. His photographs and films of the *Titanic* have been displayed throughout the world.

None of the respondents here participated in the proceedings in either the district court or the appellate court. They were never made parties to the case. Although the petitioner was able to locate the respondents and send them copies of its motion for preliminary injunction, it never properly initiated legal proceedings against them by filing a complaint; they were never served with process compelling their appearance at the preliminary injunction hearing; and, so far as the record shows, none of them has any contact with Virginia. Additionally, the respondents did not participate in the expedition that visited the wreck site after the district court issued its injunction on June 23, 1998.

B. Factual And Procedural History

The petition contains an incomplete recitation of the facts and procedural history which bear significantly on

the issues that would be before the Court if certiorari were granted. Accordingly, the following factual and procedural history corrects certain misstatements and omissions of fact in the petition.

When the *Titanic* set sail from Southampton, England on April 10, 1912, it was the largest man-made movable object in the world. Shortly before midnight on April 14, 1912, the "unsinkable ship" struck an iceberg approximately 400 miles southeast of Newfoundland, Canada, and sank in a little over two and a half hours. App. 4. Only 705 passengers and crew survived the sinking; more than 1500 people lost their lives.

The *Titanic* was discovered on September 1, 1985, by a team of scientists and photographers led by Dr. Robert Ballard of the Woods Hole Oceanographic Institution. Dr. Ballard's expedition discovered the *Titanic* using sonar and photographic equipment towed behind the U.S. Navy research vessel *Knorr*. The expedition confirmed that the *Titanic* split in half before sinking. The hull came to rest in two sections, separated by large debris field, at a depth of 12,500 feet. App. 84. The remains of the passengers and crew who lost their lives were eventually devoured by marine organisms. The only trace of human existence remaining today are shoes and other man-made items that litter the bottom. Among other things, the expedition produced an extensive photo mosaic and survey of the wreck site, which have been used by subsequent expeditions to plan their operations at the wreck site.

Dr. Ballard returned to the *Titanic* in 1986 to photograph the wreck using the deep diving submersible *Alvin*

and the remotely operated vehicle *Jason Junior*. The expedition conducted ten dives and took more than 57,000 photographs of the wreck site. Many of these photographs were eventually published in *National Geographic* magazine, and Dr. Ballard's expedition was the subject of a National Geographic Society documentary.

Dr. Ballard never permanently recovered any artifacts from the *Titanic*, and he never asserted a claim to the wreck in court. Instead, he worked to promote an international agreement to protect the *Titanic* from commercial salvage and to obtain passage of the R.M.S. Titanic Maritime Memorial Act of 1986 ("the Act"), 16 U.S.C. § 450rr, *et seq*. The Act expresses the sense of Congress that "limited exploration activities concerning the R.M.S. Titanic should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance." 16 U.S.C. § 450rr-5. The Act also proscribes the assertion of jurisdiction by the United States over the *Titanic* wreck site because it is located in international waters. 16 U.S.C. § 450rr-6.

Three observers from The Institute of France for the Research and Exploration of the Sea ("IFREMER") were on board the *Knorr* when the *Titanic* was discovered in 1985. IFREMER did not share Dr. Ballard's sentiment that the *Titanic* should not be salvaged. In August 1987, IFREMER and TVLP salvaged the first artifacts from the *Titanic* using the submersible *Nautile*. The 1987 expedition conducted 32 dives to the wreck and recovered 1800 artifacts. App. 50. Among other things, the expedition recovered a black leather bag containing $62,000 in currency, 300 gold coins, and several items of precious jewelry. Significantly, although the petitioner claims that it has

pledged not to sell artifacts from the *Titanic*, its charter agreements with IFREMER specifically exclude gold, jewelry and currency from the definition of "artifacts." Its charter agreements also permit the sale of artifacts as a "collection" to "any entity that will make them available for exhibition to the public."

In June 1991, a joint Canadian-Russian-American expedition led by respondent Ralph White used the Russian research vessel *Akademik Mstislav Keldysh* and its *Mir I* and *Mir II* submersibles to study the *Titanic*'s marine environment and film the IMAX documentary *"Titanica."* The expedition recovered steel samples from the debris field for metallurgical testing, which subsequently revealed that the steel used to make *Titanic* was more brittle than that used today and a loss of its ductility in the cold North Atlantic waters most likely contributed to the damage that led to the ship's sinking. The expedition also shot 40,000 feet of 70 mm IMAX film, documented 28 species of animals and fish, and collected hundreds of samples of fish, rock, bacteria, specialized coral, and core samples from the deep ocean floor.

Although the 1991 expedition did not recover any artifacts, it represented a threat to the salvor's ability to obtain exclusive salvage rights because it demonstrated that the salvor had not conducted salvage operations in more than four years and, therefore, it was not undertaking salvage efforts with due diligence.

Indeed, in 1992 a would-be salvor, Marex Titanic, Inc. ("Marex"), filed a complaint in the U.S. District Court for the Eastern District of Virginia, Norfolk Division, seeking the exclusive right to salvage artifacts from the *Titanic*.

On August 12, 1992, the court asserted jurisdiction over the *Titanic*, issued a warrant to arrest the shipwreck, and ordered the U.S. Marshal to take possession of any artifacts recovered from the *Titanic* until the court made a determination of ownership. *Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 805 F. Supp. 375 (E.D. Va. 1992), *rev'd*, 2 F.3d 544 (4th Cir. 1993). Marex, however, had never performed any salvage operations at the *Titanic* site. As soon as TVLP learned of Marex's action, it intervened to assert a superior salvage claim and prohibit Marex from engaging in salvage operations. *Id.* at 376. After a hearing to determine which party had exclusive salvage rights, the district court sided with TVLP and entered an order vacating the August 12, 1992 order. *Id.* at 377. The court's order, however, was later reversed by the Fourth Circuit on technical grounds, *Marex*, 2 F.3d at 545-48, which left the question of salvage rights unresolved.

On August 26, 1993, RMST finally filed a complaint in Norfolk asking the district court to declare it to be the sole and exclusive owner of any items salvaged from the *Titanic*. App. 88-89. Relying on the presence of a single wine decanter recovered from the *Titanic* in the courtroom, the district court asserted "constructive *in rem*" jurisdiction over the *Titanic* and the wreck site. App. 46. The court ordered the U.S. Marshal to arrest the *Titanic* and the artifacts already recovered pursuant to Supplemental Admiralty Rule C(2), and RMST was appointed substitute custodian of the wreck, wreck site and artifacts recovered, in lieu of the U.S. Marshal. *Id.*

IFREMER and RMST conducted additional salvage expeditions in 1993 and 1994. App. 50, 93-95. In 1993, the

salvors recovered 800 artifacts during the course of 15 dives to the wreck. App. 50. In 1994, the salvors recovered over 1000 artifacts from the wreck site. The artifacts were transported to France for restoration and conservation. *Id.* However, two artifacts, one from each expedition, were kept in the Eastern District of Virginia to serve as "jurisdictional anchors." App. 93.

On June 7, 1994, the district court entered an order awarding RMST salvor in possession status over the *Titanic*. App. 47. Even though salvage activities were ongoing, the district court declared that RMST "is the true, sole and exclusive owner of any items salvaged from the wreck in the past, and so long as [RMST] remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights . . . " *Id.* The district court further ordered that "default judgment is entered against all potential claimants who have not yet filed claims [to the *Titanic* or its artifacts] and such claims are therefore barred and precluded so long as [RMST] remains salvor in possession." *Id.*

In 1995, RMST learned that director James Cameron intended to used the *Keldysh* and *Mir* submersibles to conduct location filming of the wreck for his movie "*Titanic*." RMST immediately threatened Cameron that it would pursue litigation against him on the grounds that filming the wreck would violate RMST's rights as salvor in possession. Cameron filmed the *Titanic* anyway, without seeking permission or a license. RMST never fulfilled its threat to pursue litigation. In a Periodic Report of Salvor in Possession on the Progress of Recovery Operations dated September 20, 1996, RMST explained to the district court that "it determined not to seek injunctive

relief" because Cameron only intended to photograph the wreck and not to recover artifacts, and these activities would not interfere with RMST's rights as salvor in possession.

In 1996, respondent John A. Joslyn unsuccessfully challenged RMST's salvor in possession status. App. 88-108. RMST sought injunctive relief when Joslyn subsequently expressed an intention to visit the *Titanic* solely to photograph it. App. 48. On August 9, 1996, the district court issued an injunction prohibiting Joslyn from photographing the wreck. *Id*. Additionally, on August 13, 1996, the district court entered an amended order expanding RMST's rights as salvor in possession to include the exclusive right to control access to the *Titanic* "for any purpose," and to control photography of the wreck and wreck site. App. 48-49, 82-86. The court explained that it made this unprecedented expansion of traditional salvage rights because RMST was unable to recoup its salvage expenses through the sale of artifacts and, therefore, it was entitled to the exclusive right to market images of the *Titanic* as a means of making a profit.[1] App. 84-85, 94 n. 10 ("As part of an agreement with the French government, RMST has promised not to sell artifacts."). Joslyn appealed the August 13, 1996 injunction to the Fourth

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[1] The court was apparently unaware of a provision in RMST's charter agreements with IFREMER which permits the sale of *Titanic* artifacts as a "collection" to "any entity that will make them available for exhibition to the public." The court also failed to recognize that the charter agreements exclude gold, jewelry and currency from the definition of "artifacts," and that RMST had already pledged the contents of the black bag recovered in 1987 as collateral for various loans.

Circuit, but the appeal was dismissed before a hearing on the merits pursuant to a stipulation filed by the parties. App. 49.

In August 1996, RMST returned to the *Titanic* with a large contingent of support vessels, including a cruise ship filled with celebrities and passengers who paid fares as high as $6,950 to watch the expedition's recovery efforts. App. 92. The primary purpose of the 1996 expedition was to raise a large section of the hull dubbed the "Big Piece." App. 95. This effort was unsuccessful. In fact, RMST recovered just 74 objects during the 1996 expedition. App. 50.

In 1998, RMST planned to return to the wreck to recover the "Big Piece," and to produce the first live television broadcast from the wreck itself. App. 57-58. The P.P. Shirshov Institute of Oceanology of the Russian Academy of Sciences, which owns the *Keldysh* and *Mir* submersibles, also planned to return to the *Titanic* in 1998 to conduct additional scientific experiments. App. 52-54. The scientific expedition was to be financed by respondent Deep Ocean Expeditions ("DOE"), which proposed to charge an international group of passengers $32,500 each to dive to the wreck and participate in the scientific research. *Id.* Each dive on the expedition, which was promoted as "Operation Titanic," would be filmed, and passengers would receive videotapes of their dives to keep as mementos. *Id.* DOE and the Shirshov Institute pledged not to recover any artifacts or disturb the *Titanic*. App. 54.

When RMST learned of Operation Titanic, it was engaged in negotiations with NBC and The Discovery Channel to license the exclusive television broadcast rights to its 1998 expedition for $6 million. App. 73. RMST immediately filed a motion for preliminary injunction in its *in rem* action against the *Titanic*. App. 9, 45, 54-55. RMST's motion requested that any person or entity mentioned in Operation Titanic's promotional material, including respondents Alfred McLaren, Don Walsh and Ralph White, be prohibited from visiting or photographing the *Titanic*. App. 45, 54-55. RMST mailed its motion to some of Operation Titanic's participants, including respondents McLaren, Walsh and White. App. 56. It did not, however, initiate legal proceedings against them by filing a complaint. App. 16. They were never served with process, and the court lacked *in personam* jurisdiction over them. App. 16, 18.

The district court held a hearing on RMST's motion on May 27, 1998. App. 56. The respondents did not appear at the hearing because they were not parties to the case and they were not served with any process. App. 10. The district court, however, adjudicated the respondents' rights in their absence.

On June 23, 1998, the district court issued a preliminary injunction prohibiting all of the individuals and entities identified in RMST's motion, including respondents McLaren, Walsh and White, from visiting the *Titanic* for any reason. App. 45-81. The injunction prohibited the respondents and "all the world" from entering a 168 square mile area of the high seas encompassing the *Titanic* for an indefinite period of time. App. 79-80. The

district court reaffirmed its decision that RMST was entitled to the exclusive right to control access and photography because it had agreed not to sell artifacts and, therefore, it was entitled to alternative means of making a profit. App. 78. The district court did not acknowledge any of the prior scientific or photographic expeditions that had visited the wreck site. The district court also did not consider the competing interests of the scientific community or the multiple documentaries and films that have already featured the *Titanic*. Instead, the district court gratuitously criticized the non-parties for failing to appear at the preliminary injunction hearing, App. 73-74; it referred to the non-parties as "thrill-seekers," "adventure tourists" and "souvenir hunting photographers," App. 74, 76 and 79; and it belittled the harm they would suffer if they were prohibited from visiting the *Titanic*, referring to it as "nostalgic," "minimal," "sentimental" and "speculative." App. 73-74. Indeed, the district court seemed annoyed that it was even forced to consider the non-parties' rights at all, stating: "Even comparing RMST's harm with the quixotic harm of a band of adventure tourists borders on irrational." App. 74. In one particularly memorable finding, the district court rationalized that the respondents would not suffer any harm because they could each save $32,500 by staying home to watch the *Titanic* on television. *Id.*

In August 1998, RMST returned to the *Titanic* and succeeded in raising the "Big Piece." It also presented the first live television broadcast from the *Titanic* wreck. A few days after RMST left the wreck site, the *Keldysh* arrived with a team of scientists and a dozen passengers. On September 9, 1998, the first expedition members dived

to the *Titanic*. A week later, RMST filed a notice requesting that the district court hold the expedition participants in criminal contempt of court for violating its injunction.

On March 24, 1999, the Fourth Circuit issued its decision affirming the district court's order in part, reversing it in part, and remanding with instructions to the district court to modify its order in accordance within the appellate court's opinion. App. 1-44. The Fourth Circuit rejected RMST's argument that an injunction is valid against a non-party who merely received a copy of a motion for preliminary injunction in the mail, as opposed to an actual party who is named in a complaint, served with process and enjoined after an opportunity to appear and be heard. App. 18-20. Therefore, the appellate court reversed the injunction because the district court lacked personal jurisdiction over the non-parties. *Id.*

The appellate court also rejected RMST's argument that it deserved the exclusive right to control access and photography as a "bonus" for agreeing not to sell artifacts. App. 40-43. The appellate court found that no precedent existed to support such a merger of intellectual property rights and traditional salvage rights. *Id.* Indeed, the appellate court found that awarding exclusive photographic rights to a salvor was contrary to the purpose of salvage law, which is to recover property lost at sea, because it would encourage salvors to leave ships in place so they can collect revenue by licensing access and photographic rights. *Id.*

The appellate court, however, affirmed RMST's right to recover artifacts without direct interference from others while it is on site. App. 40. The appellate court also

decided that a United States district court can properly assert jurisdiction over a shipwreck located in international waters, finding that the precedent for such an assertion exists in the 3000 year history of international maritime law. App. 36-40.

Finally, on April 21, 1999, RMST publicly announced that it had licensed the exclusive worldwide rights to exhibit the artifacts recovered from the *Titanic* to SFX Entertainment, Inc., one of the largest promoters and owners of live entertainment venues in the United States, for a guaranteed minimum payment to RMST of $8.5 million annually. The licensing agreement has an initial term of one year, beginning September 14, 1999. SFX has the option to extend the term of the licensing agreement for up to four additional one year periods. This licensing agreement has provided a significant boost to RMST's revenues, which should permit the company to continue preserving and displaying artifacts in the absence of exclusive photographic rights.

REASONS FOR DENYING THE PETITION

RMST asserts two reasons for granting its petition: (1) the appellate court allegedly "significantly constricted the jurisdiction of federal courts to address admiralty matters," thereby "forcing RMST to pursue, in forums all over the world, those who jeopardize its rights as salvor-in-possession[;]" and (2) the appellate court's ruling "will encourage lawlessness and anarchy on the high seas" and "creates the risk that the salvage of historic shipwrecks will be conducted in an irresponsible manner." Pet. at 8-9.

The petition ignores the Fourth Circuit's proper application of established legal principles. Moreover, RMST's hyperbole has no basis in fact.

A. The Fourth Circuit Properly Found That The District Court Erred In Adjudicating The Respondents' Rights In The Absence Of *In Personam* Jurisdiction

The respondents were not parties to the action in the district court. RMST never properly initiated legal proceedings against them by filing a complaint; they were never served with process compelling their appearance at the preliminary injunction hearing; and, so far as the record shows, none of them had any contact with Virginia.

Even though the petitioner complains that it will be forced "to pursue" the respondents "in forums all over the world," the Fourth Circuit placed a burden on RMST that is no greater than that faced by any other litigant. Moreover, it would not have been difficult for RMST to initiate civil proceedings against respondents McLaren, Walsh and White where they reside in the United States. In fact, RMST maintains its headquarters in New York City, where respondent Alfred McLaren resides. RMST could have easily initiated civil proceedings against the respondents by filing a complaint against them in accordance with Rule 3 of the Federal Rules of Civil Procedure, and by serving them with process in accordance with Rule 4. Instead, RMST chose to engage in procedural shenanigans by filing a motion for preliminary injunction naming the respondents as defendants in RMST's *in rem*

action against the shipwreck, and then improperly informing the respondents that, in essence, they could pay tens of thousands of dollars to retain legal counsel, travel hundreds or thousands of miles to defend themselves, and waive all jurisdictional and procedural defects by appearing in Virginia and participating in RMST's legal charade.

Despite these fatal procedural defects, the district court violated the respondents' right to due process by adjudicating their individual rights in the absence of *in personam* jurisdiction. Moreover, the district court criticized the respondents for failing to appear at a preliminary injunction hearing, and it denigrated the harm they would suffer if they were prohibited from exploring the *Titanic*.

The Fourth Circuit correctly applied well-established legal principles in finding that the district court committed error by failing to ensure that the respondents were actually made parties to the case, that they were properly served with process, and that the district court otherwise could constitutionally exercise personal jurisdiction over them. App. 16-20. In resolving the jurisdictional dispute, the Fourth Circuit emphasized the distinction between *in personam* jurisdiction and *in rem* jurisdiction:

> "[a]ctions *in rem* are prosecuted to enforce a right to *things*," whereas "actions *in personam* are those in which an *individual* is charged personally." *The Sabine*, 101 U.S. 384, 388 (1879) (emphasis added). Because *in rem* actions adjudicate rights in specific property before the court, judgments in them operate against anyone in the world claiming against *that* property.

> *See The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866) (describing *in rem* jurisdiction and stating that "[i]t is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world"); *see also Darlak v. Columbus-America Discovery Group, Inc.*, 59 F.3d 20 (4th Cir. 1995). Consequently, judgments in *in rem* actions affect only the property before the court and carry no *in personam* significance, other than to foreclose any person from later seeking rights in the property subject to the *in rem* action. *See Pennoyer*, 95 U.S. at 724. The court's authority to exercise *in rem* jurisdiction does not carry with it a concomitant, derivative power to enter ancillary *in personam* orders. *See The Sabine*, 101 U.S. at 388.

App. 16-17.

Accordingly, the Fourth Circuit found that: "[i]njunctive relief, by its very nature, can only be granted in an *in personam* action commenced by one party against another in accordance with established process. Consequently, a party cannot obtain injunctive relief against another without first obtaining *in personam* jurisdiction over that person or someone in legal privity with that person." App. 17. *See also Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 570-71 (5th Cir. 1981) (court cannot adjudicate competing claims to shipwreck over which it has *in rem* jurisdiction without first perfecting *in personam* jurisdiction over the parties).

The cases cited by the petitioner do not overcome the Fourth Circuit's recognition that *in personam* jurisdiction

and *in rem* jurisdiction are both "grounded on the principle that 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory[.]' " App. 16 (citing *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877)). In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), both the property, fish passing through recognized tribal fishing grounds in a defined area of Washington, and the non-parties, non-Indian citizens of Washington, were located within the court's territorial jurisdiction. *Washington*, 443 U.S. at 669-71. Similarly, in *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972), the property, a Florida school, and the non-party, a racist agitator, were located within the court's territorial jurisdiction. *Hall*, 472 F.2d at 263-64. Finally, in *Zych v. S.B. Lady Elgin*, 1991 WL 34714, 1991 U.S. Dist. LEXIS 2962 (N.D. Ill. 1991), *vacated on other grounds*, 960 F.2d 665 (7th Cir.), *cert. denied*, 506 U.S. 985 (1992), both the property, a shipwreck located in Lake Michigan, and the alleged violators of the court's injunction were located in Illinois. *Zych*, 1991 WL 34714, *5. This case is different because neither the shipwreck nor the respondents are located within the district court's territorial jurisdiction.

Additionally, the All Writs Act, 28 U.S.C. § 1651, does not enlarge the district court's territorial jurisdiction. It simply provides that: "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (emphasis added). Moreover, the All Writs

Act does not permit the district court to violate an individual's right to due process, particularly where the court lacks *in personam* jurisdiction over the individual.

It is well-settled that due process precludes courts from adjudicating *in personam* the rights or obligations of a person where the individual is not a party and in the absence of personal jurisdiction. *See Omni Capital Int'l, Ltd. v. Rudolph Wolff & Co. Ltd.*, 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process."). To obtain personal jurisdiction over a defendant, a court must have: (1) proof of "notice to the defendant;" (2) "a constitutionally sufficient relationship between the defendant and the forum;" and (3) either "a basis for the defendant's amenability to service of summons" or, absent consent, "authorization for service of a summons on the defendant." *Omni Capital*, 484 U.S. at 104.

None of these requirements were satisfied by the petitioner. RMST could have properly initiated civil proceedings against respondents McLaren, Walsh and White in the districts where they reside. It simply decided not to do so. Accordingly, the Court should not waste its valuable time reviewing a case where the petitioner does not even care to follow the rules of civil procedure.

B. The Petition Significantly Misstates The Likelihood Of Conflict If Non-Salvors Are Permitted To Visit The *Titanic*.

The petitioner argues that this Court should reverse the decision of the Fourth Circuit because it "will encourage lawlessness and anarchy on the high seas" and it "creates the risk that the salvage of historic shipwrecks will be conducted in an irresponsible manner." Pet. at 8-9. Nothing could be further from the truth.

The petitioner significantly misrepresents the potential for conflict on the high seas if the appellate court's decision is not reversed. In the 14 years since its discovery, and after ten expeditions to the wreck site, the only competition over access to the *Titanic* has occurred in the courtroom. There has never been a confrontation on the high seas, and it is extremely unlikely that one will ever occur.

Because the *Titanic* sits at such an extreme depth, where the water pressure is in excess of 6000 pounds per square inch, it is impossible to reach the wreck without using extraordinarily sophisticated and expensive underwater equipment. Salvage must be conducted by use of a manned submersible. Currently, there are only five submersibles in the world that can operate at the depth of the *Titanic*: *Alvin*, *Nautile*, *Mir I*, *Mir II* and *Shinkai 6500*. All of these submersibles, with the exception of the Japanese *Shinkai 6500*, have already visited the wreck site. Only the *Nautile*, which is owned by the French government, has participated in salvage operations. The *Alvin*,

which is owned by the U.S. Navy, and the *Mir* submersibles, which are owned by the Russian Academy of Sciences, have limited their activities at the wreck site solely to conducting exploration, photography and scientific experiments. They have never recovered any artifacts from the wreck site. Contrary to the petitioner's dire prediction that "lawlessness and anarchy" are about to reign on the high seas, nothing but harmony has occurred at the *Titanic* wreck site since the wreck was discovered 14 years ago.

The petitioner also misrepresents the potential for salvage being conducted in an irresponsible manner if the Fourth Circuit's decision is not reversed. The Fourth Circuit's decision will not lead to a free-for-all of inappropriate salvage. Indeed, the district court found that RMST was engaging in responsible salvage operations when it appointed RMST salvor in possession in 1994, long before it awarded RMST exclusive access and photographic rights. App. 96-107. As in all modern shipwreck salvage cases, the district court was required to consider whether the salvor was maintaining the archaeological and historical value of the wreck and items salved in determining whether the salvor was entitled to salvor in possession status. *See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992) (*"CADG"*), *cert. denied*, 507 U.S. 1000 (1993); *Deep Sea Research, Inc. v. The Brother Jonathan*, 883 F. Supp. 1343, 1362 (N.D. Cal. 1995), *aff'd*, 102 F.3d 379 (9th Cir. 1997), *aff'd in part, vacated in part and remanded*, 118 S. Ct. 144 (1998); *MDM Salvage v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308, 310 (S.D. Fla. 1986). The Fourth Circuit's decision does not change this requirement.

The Court should not be misled by the petitioner's unfounded suggestion that lawlessness and anarchy will reign on the high seas if the Fourth Circuit's decision is not overturned. Similarly, the Fourth Circuit's decision will not cause a deterioration in the principles adhered to by professional salvors because their ability to obtain and maintain exclusive salvage rights depends on their faithful adherence to maintaining the archaeological and historic integrity of the wreck site.

C. The Fourth Circuit Properly Found That Awarding Exclusive Access And Photographic Rights Is Contrary To The Purpose Of Salvage Law

The purpose of the law of salvage is to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts. *The Akaba*, 54 F. 197, 200 (4th Cir. 1893). *See also The Sabine*, 101 U.S. 384 (1880); *CADG*, 974 F.2d at 460-61 ("the primary purpose of salvage law is the preservation of property"); *MDM Salvage*, 631 F. Supp. at 312 (salvage law is primarily concerned with the successful recovery of the vessel). Under the law of salvage, a person who returns a shipwreck to its rightful owner, or the property lost to the "stream of commerce," is entitled to a liberal reward for their services, which is normally derived from the sale of the property recovered. *CADG*, 974 F.2d at 459-61. However, because the salvor is voluntarily rendering assistance, he assumes the risk that he may not be fully compensated for his services. There is no legal guarantee that a salvor will always realize a profit from his activities.

The Fourth Circuit recognized that awarding exclusive photographic rights to a salvor was contrary to the purpose of salvage law because it would encourage salvors to leave property in place so they can collect revenue by licensing photographic rights and charging the public for the opportunity to view the wreck.[2] App. 42. This is exactly what RMST has done with the *Titanic*. Since RMST was awarded the exclusive right "to exploit the wreck" in August 1996, the number of artifacts it has recovered has dropped dramatically. In 1987, 1993 and 1994, RMST recovered a total of 3600 artifacts. App. 50-51. In 1996, however, RMST recovered just 74 artifacts. App. 50. And, while nearly all of RMST's expedition costs in 1998 were paid directly by the Discovery Channel in exchange for exclusive photographic rights, App. 57-59, 73, the 1998 expedition recovered fewer than 100 artifacts.

Moreover, there is no evidence that RMST has not made a profit from the display of artifacts. In fact, attendance at RMST's museum exhibitions increased due to heightened public interest caused by the movie "*Titanic*," App. 58-59, which was filmed without RMST's authorization. In addition, just one month after RMST lost its exclusive rights of access and photography, it successfully completed a lucrative licensing agreement with SFX Entertainment for the display of artifacts. Therefore,

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[2] As an alternative basis for reversing the district court's award of exclusive access and photographic rights, the Fourth Circuit found that ordinary property rights and intellectual property rights do not include the right to exclude viewing and photographing property when it is located in, or visible from, a public place. App. 42 n.5 (citing 17 U.S.C. § 120(a)). This ruling is also correct.

RMST's implied threat that it may be forced to sell the *Titanic* artifacts if the Court denies review is without merit.

The Fourth Circuit properly found that the district court's extension of salvage law to include the exclusive rights to visit, view and photograph the *Titanic* at its location in international waters was both unwarranted and unprecedented. There is no compelling basis for the Court to reverse this decision.

D. The Public Interest Is Best Served By Maintaining Public And Scientific Access To The *Titanic* And Other Historic Shipwrecks

The petitioner argues that it is in the public interest to deny public and scientific access to the *Titanic* because the petitioner is returning artifacts "to society for the general use and education of all mankind." Pet. at 13 (citing App. 78). This myopic argument ignores the substantial benefit the public has already received from scientific exploration of the *Titanic*, and the public interest in maintaining access to the *Titanic* and other historic shipwrecks for exploration and scientific study.

Congress has unequivocally expressed the sentiment of the American public that "limited exploration activities concerning the R.M.S. *Titanic* should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance." 16 U.S.C. § 450rr-5. Furthermore, Congress has explicitly recognized that science flows from exploration, and that scientific exploration is worthy of national acclaim and encouragement. It has declared a national policy "to develop, encourage,

and maintain a coordinated, comprehensive, and long-range national program in marine science for the benefit of mankind." 33 U.S.C. § 11019(a). The objectives of that policy include "encouragement of private investment enterprise in exploration, technological development, . . . and economic utilization of the resources of marine environment," and cooperation "with other nations . . . in marine science activities." 33 U.S.C. § 11019(b)(2), (3) and (8).

The public has already benefitted immeasurably from scientific exploration of the *Titanic*. Dr. Ballard's 1985 and 1986 expeditions contributed significantly to the fields of underwater sonar mapping, deep-sea visual imaging technology and underwater photography, as well as the development of Woods Hole Oceanographic Institution's Deep Submergence Lab. The 1991 expedition, conducted by respondent Ralph White and many of the other non-parties enjoined by the district court, was the most important scientific expedition to the *Titanic* to date. In addition to filming a feature length documentary in enlarged 70 mm format, the expedition collected hundreds of samples of fish, rock, bacteria and specialized coral, core samples from the deep ocean floor, and steel samples for metallurgical testing. It also studied the biology, sediment transport and organic corrosion rates of the deep ocean. The 1995 expedition led to advances in film-making technology and underwater lighting systems.

Additionally, 28 species of animals and fish inhabiting the deep ocean have been discovered during scientific expeditions to the *Titanic*. In fact, prior to the discovery of the *Titanic*, it was thought that very little sea life existed

in the deep ocean around the *Titanic*, where the water temperature is near freezing, there is no natural light, and the water pressure exceeds 6000 pounds per square inch. As a direct result of the scientific exploration of the *Titanic*, this theory has been disproved.

Limiting access to the *Titanic* to infrequent salvage expeditions conducted by one company would actually harm the public interest. From 1987 through 1998, there were a total of 1320 days during which RMST could have conducted on-site operations. RMST has conducted on-site operations on only about 180, or 14 percent, of the available days. Most of those days have been spent salvaging artifacts rather than performing scientific research. Moreover, in 1998, many of the expedition's days were spent either filming or preparing to film the Discovery Channel live broadcast. Consequently, RMST has not, and can not, perform all the scientific research the *Titanic* deserves. Moreover, RMST makes no guarantee that it will ever return to the wreck site.

The district court's decision that RMST's salvor in possession status included the exclusive right to indefinitely prohibit all public and scientific access to the *Titanic* for any purpose, including scientific study, exploration and photography, was detrimental to the respondents, scientists and the public at large. The district court's decision subjected the respondents to the threat of legal action in foreign jurisdictions, despite the lack of any proper initiation of legal proceedings against them, the lack of service of process, the absence of any contacts with the forum, and the fundamental unfairness of being

hauled into court for engaging in exploration and scientific study.

The appellate court's decision, however, determined that historic shipwrecks deteriorating on the ocean floor should be readily accessible to those who are willing and able to surmount the innumerable obstacles to explore and study them without fear of facing retribution or sanctions, and without being labeled trespassers, "thrill-seekers" or "adventure tourists." The appellate court's decision will have a profound effect on underwater scientific exploration because it confirms that exploration does not conflict with salvage operations, particularly where the explorers have openly promised that they will not recover artifacts. The appellate court's decision also ensures that salvage operations may continue without direct interference from others, even when the shipwreck is located in international waters.

The Fourth Circuit properly decided that the ocean is large enough to accommodate continued multiple uses of the *Titanic*, including scientific study, photography and the recovery of artifacts. It is clearly in the public's best interest to maintain free and open access to the *Titanic* during the frequent periods when RMST is not conducting salvage operations on site. There is no compelling basis for the Court to overturn this decision.

CONCLUSION

The *Titanic* is not a theme park. The wreck site is the scene of a tragedy and the final resting place of more than 1,500 souls. It should be treated with dignity, studied and explored. In addressing several important issues of maritime law, the Fourth Circuit properly balanced the equities and came to a decision that is fair to all those individuals whose rights are affected by this case.

The Fourth Circuit properly applied the well-settled legal principle that the district court's authority to exercise *in rem* jurisdiction over property does not carry with it a concomitant, derivative power to enter ancillary *in personam* orders over individuals who are not parties to the proceedings and are not located within the court's territorial jurisdiction. The Fourth Circuit also properly found that no precedent exists to support the petitioner's argument that the person who has the legal right to remove artifacts from the wreck site also has the "exclusive right to exploit the wreck" by prohibiting access, exploration and scientific study by others who do not interfere with the recovery of artifacts, and such an extension of traditional salvage rights would be contrary to the purpose of salvage law. There is no compelling basis for the Court to review the decision of the Fourth Circuit. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted this 21st day of July, 1999.

David G. Concannon, Esquire
Kohn, Swift & Graf, P.C.
1101 Market Street, 24th Floor
Philadelphia, PA 19107-2924
(215) 238-1700

Counsel for Respondents
Alfred S. McLaren, Ph.D.,
Don Walsh, Ph.D. and
Ralph White